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No. 958

In the

Supreme Court of the United States

OCTOBER TERM, 1963

PAUL REVERE LIFE INSURANCE COMPANY,
Petitioner,

v.

FIRST NATIONAL BANK IN DALLAS, ADMINISTRATOR OF THE ESTATE OF LOY THOMAS BROWN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

This case involves the application of the federal abstention or *Pullman* doctrine in a removal-diversity suit regarding payment of life insurance proceeds to Texas residents involving the application of Texas law to undisputed facts in construing an insurance contract written in Texas. The Court of Appeals, Fifth Circuit, *en banc* has deferred decision on the merits preferring not to speculate, until Texas Courts have had an opportunity to authoritatively construe the insurance contract, under controlling State

law. There is now a declaratory action pending in the State Court, instituted by the parties to a companion case, *United Services Life Insurance Company v. Delaney*, which, when decided, will in reasonable probability furnish a controlling *Erie* precedent.[1]

QUESTION PRESENTED

Is it a per se abuse of discretion, for a Federal Appellate Court in a diversity case involving only state law, to defer decision until the State Courts, possessed with adequate declaratory machinery, have authoritatively determined the controlling issue.

STATEMENT

The merits herein involve a single, but important issue, the proper application of Texas law to the construction of a life insurance contract sold in Texas to a Texas citizen. The facts are undisputed: the insured, Loy Thomas Brown, died in the crash of a private airplane which he was operating on August 26, 1960. Suit was brought by his administrator, designated as Respondent herein, against the Petitioner-insurer in a state district court. The insurer removed to the Federal District Court, and upon submission of an agreed statement of facts judgment was rendered for the Respondent-Administrator. Upon appeal to the Court of Appeals, Fifth Circuit, the case was considered *en banc* with a companion case, *United Services Life Insurance Co.*,

[1] Cause No. F160,538, entitled *United Services Life Insurance Company v. Joan Flores Delaney*, is now pending in the 37th District Court of Bexar County, Texas, being a suit for declaratory judgment instituted pursuant to the order of the Fifth Circuit herein.

v. Delaney. That Court abstained under the so called *Pullman* doctrine so that the controlling state law could be authoritatively applied to the facts herein. Petitioner's statement seems to infer that the "difficulty of determination" of state law was the sole ground for the order of the Court of Appeals. However, the opinion of that court cannot be so construed in view of the salient policy, underlying and expressed in said opinion, to encourage and substitute an authoritative declaration of controlling state law, for what would otherwise be a mere prediction of how the state court will ultimately decide the matter, especially when adequate judicial machinery exists therefor. Also unemphasized in the Petitioner's statement is the fact that this suit involves the judicial construction of a life insurance contract, a function akin to the general regulation of the insurance business, which generally remains the exclusive function of the several states.

By agreement of all parties, the heirs of Loy Thomas Brown, Mrs. Lorraine Brown and Sharon Brown, have been substituted as parties Respondent herein with the approval of the Probate Court of Dallas County, Texas, in place of the Administrator, First National Bank in Dallas, because the Estate is being closed.

SUMMARY OF ARGUMENT

The decision below does not conflict with any applicable policy announced by this Court in view of the fact that:

1. The lower Federal Courts, having contact with counsel and or the litigants are in a favorable po-

sition to exercise their discretion to obtain the best balance between the sometimes conflicting policies of:

A. The expeditious disposal of litigation, sometimes frustrated by abstention, and,

B. The correct and authoritative application of State law, sometimes denied a litigant through the failure to abstain.

2. A reversal of the lower court's stay order, requiring an immediate prediction of state law would create an unfortunate precedent, substituting a rigid rule of expediency in the decision of diversity cases in place of the flexible discretion possessed by the lower courts to adjust the method of decision in accord with the requirements of justice based upon the particular situation, or conduct of the parties.

3. There is no evidence of any unwarranted injury or delay to either party.

4. Adequate judicial machinery exists in the State Courts to efficiently and effectively supply an authoritative answer to the issue involved through the use of declaratory relief coupled with a procedure for summary judgment. Texas Civ. Stat. Ann. Art. 2524-1 and Texas Rule of Civil Procedure 166-A.

Petitioner's doubts about the effectiveness of State Court relief expressed in footnote 13, page 15, of its application are frivolous and exaggerated. Texas has long had express provision for declaratory and summary judgments. Texas unequivocally applies the general rule that the pendency of a prior suit between the same parties in a federal court is not ground for abatement of a subsequent suit in a court of the state in which the federal court sits. *Aetna Cas. & Surety Co. v. Brunken*, 373 S.W. 2d 811 (Tex. Civ. App. 1964).

5. The state decision, soon to be forthcoming in the companion case, will in all probability authoritatively, finally and decisively dispose of the issues herein.

6. A State decision in this case will not involve further "shuttling" back and forth between the Federal and State Courts since there are no Federal questions entwined with State law.

7. The citizens of the several states have the right to expect an authoritative decision in accord with local policies, in place of what is at best a tentative legal forecast.

8. The State courts have a protectable interest in promulgating the legal principles applicable to the life insurance business for the protection and welfare of its citizens.

ARGUMENT

It is respectfully submitted that the Fifth Circuit holding dramatically demonstrates the need of the lower Federal Courts, exercising diversity jurisdiction, to be allowed to exercise their sound discretion and judgment in balancing the sometimes clashing policies of: (1) expeditious disposition of litigation versus (2) an authoritative application of the law, fully insuring the uniform result in Federal and State Courts to which litigants are entitled under *Erie R. Co. v. Thompkins*, 304 U.S. 64, 58 S. Ct. 817.

Although the Court below, exercising diversity jurisdiction, can render at best a tentative and indecisive forecast

of the application of Texas law to the insurance contract involved, the Petitioner demands an immediate adjudication grounded upon reasons of expedience alone. Each litigant in a diversity case is entitled to a correct and authoritative application of the local law. Certainly expediency alone does not dictate that litigants *must* be bound to accept a forecast or guess as to the proper application of local law when efficient judicial machinery supplied through reformed state procedure stands ready to perform the service of supplying a definitive precedent. It is "* * * not conducive to the interest of law in general that this court should compel a decision in a federal court which tomorrow or the day after may be definitively contradicted by the State Court with the final say." Concurring opinion of Mr. Justice Frankfurter in *Sutton v. Lieb*, 342 U.S. 402, 413, 72 S. Ct. 398. It is not enough to say that a federal court, exercising diversity jurisdiction, is just another state court. It is inescapable that no matter how diligently a federal tribunal may work at forecasting the development of state case law, its labors amount to no more than an educated guess. As succinctly noted by Judge Brown in *Duke v. Sun Oil Co.*, 320 F. 2d 853, 858 (5th Cir. 1963).

> "* * * [U]nder Erie, we are sitting as a Texas Court applying Texas law as best we can divine it, conscious all the while that our decision loses authority when the first Texas writing court declares to the contrary."

Not only might such an opinion lose precedential authority, but worse and far more important, the *litigants* in the first case have irretrievably suffered the effects of

an incorrect application of state law supposedly assured to them under *Erie*.

> "The nub of the policy that underlies *Erie R. Co. v. Thompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a State Court a block away should not lead to a substantially different result."

Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109, 65 S. Ct. 1464, 1470. A blind and unyielding rule removing the sound discretionary features of abstention would foster just such inconsistent results, frustrating the *Erie* rule.

The several cases, cited by petitioner, withholding application of the doctrine in *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, do not, we submit, stand for the proposition that a diversity jurisdictioned federal court *must not* abstain under the circumstances of this case, *viz*:

1. During the pendency of a companion case involving the common dispositive issue, on its way to a decisive state adjudication. (*United Services Life Ins. Co. v. Delaney* the companion to this case, is now awaiting declaratory decision in the State Court.)
2. The absence of any serious claim by Petitioner that the stay by the Fifth Circuit constitutes any real injury. Indeed such a claim would be more likely to come from Respondent, the claimant below, who is not, as the Petitioner, a solvent insurance carrier, staffed and attended with counsel and resources ready for litigation. The Respondent stands ready to cooperate in obtaining a prompt declaration of state

law while it is the Petitioner who creates delay by being unwilling to abide with the Fifth Circuit Order.

3. A legitimate congressional policy, evidenced to some extent by the McCarran Ferguson Insurance Regulation Act, 15USCA § 1011, 12, has been a recognition that it is in the public interest that the several states continue to regulate the insurance business. Although the McCarran Ferguson Act certainly does not oust the federal courts of all jurisdiction in insurance cases, *Maryland Cas. Co. v. Cushing* 347 U.S. 409, 74 S. Ct. 608, the act and the general policies evidenced thereby do supply a persuasive reason for allowing a discretionary delay in the exercise of that jurisdiction. This is especially true in this case where the policies evidenced by the McCarran Act are not entwined with any federally created rights as were the facts in *Maryland Cas. Co. v. Cushing*.

Respondent will frankly admit that in some instances the shuttling back and forth between federal and state forums can defeat the ends of justice. But this is not such a case. Far from being an academic exercise, the device of federal abstention in this case is a legitimate tool for insuring an authoritative decision tailored to the policies and purposes of controlling state law. Abstention certainly does not always lead to double costs. When a federal appellate court promptly abstains, the parties are permitted to submit the salient state questions in familiar and convenient surroundings at home. They are not required to travel to a distant city, pos-

sibly in another state where the Circuit happens to sit. They are not required to submit their case to a panel possibly comprised of jurists from other states appointed for reasons other than their knowledge of the law of the litigants own particular forum.

The most reasonable policy regarding abstention is to clothe federal trial and appellate courts with sufficient discretion to determine when justice, as applied to the parties before it, favors the expendiency of a federal forecast of state law, and when it will permit the enlightened submission of controlling questions to the appropriate state forum. A review of this case by this court, much less a decision for Petitioner, would have these undersirable effects:

1. The litigation in reasonable probability will take as long or longer than if it is allowed to be submitted to the state courts.

2. An inflexible rule would be established seriously limiting if not emasculating the well established abstention powers now being effectively used.

Petitioner attempts to bring itself within the purview of *Meredith v. City of Winter Haven*, (1943) 320 U. S. 228, 64 S. Ct. 7, by implying that the Fifth Circuit abstained on the sole ground that the controlling Texas law is "difficult of determination." As mentioned in points 1-8 in our outline of argument herein, there are many policy reasons favoring abstention in this case equally as compelling as those announced in *Louisiana Power & Light Co. v. Thibodaux*, (1959),

360, U.S. 25, 79 S. Ct. 1070; *Clay v. Sun Ins. Office Ltd.*, (1960) 363 U. S. 207, 80 S. Ct. 1222; and *England v. Louisiana State Bd. of Med. Examiners*, (1964)—U. S.—, 84 S. Ct., 461. Indeed, in the absence of a combination of federal and state questions, abstention for state considerations alone can be more expeditious and even more effective than in those cases involving a separation of those considerations. If the factors favoring abstention in *Thibodaux*, *Sun Ins.*, and *England* were sufficient to override the inconvenience caused thereby, such factors are even more compelling here where the entire controversy can be authoritatively disposed of by one pronouncement from the Texas Courts.

The recent decision of the First Circuit in *Commerce Oil Refining Corp. v. Miner*, 303 F. 2d 125, 128 (1962) correctly states:

> "Whether in a particular instance a federal court should stay its hand pending state court action seems to us a highly individual question in which all factors should be considered, the possibility of delay, the relative difficulty of estimating what the state court would decide, the importance to the case of a state court determination, the relative burden on the parties of a possibility of a long case in federal court as against a short one in the state court, and perhaps other matters. The mere prospect of delay is not determinative."

The benefits of abstention as applied by the Fifth Circuit have been dramatically demonstrated in *Green v. American Tobacco Co.*, 304 F. 2d 70 (5th Cir. 1962). Upon certification the Florida Court decided the merits entirely differently than did the Fifth Circuit in its original opinion. The substantial right of a litigant to obtain an authoritative, correct

application of the law of his state should not give way to an inflexible rule depriving the lower federal courts of discretion to fashion an appropriate vehicle for decision founded solely upon considerations of expediency.

CONCLUSION

The decision below is based upon its own particular facts and policy considerations. It cannot be fairly construed to broaden or restrict the already existing body of abstention law. The expediency arguments underlying the Petitioner's argument would actually be defeated by the time consumed by a review in this Court. Respondents respectfully submit that the interests of justice will be best served if this case is allowed to proceed to a prompt state adjudication.

Accordingly, Respondent prays that certiorari be denied.

Respectfully submitted,

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